

OGC HAS REVIEWED.

REFERENCE (A)

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19 December 1953

MEMORANDUM FOR: DD/P-ADMIN

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SUBJECT: Annual Leave - [REDACTED] Staff Agents

REFERENCE: Your memorandum dated December 4, 1953, same subject, attaching memorandum from Administrative Officer, IO Division.

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1. The reference requests a legal opinion on the question whether unused annual leave of two [REDACTED] staff agents in excess of the maximum amount that may be carried forward into the next leave year must be forfeited. The facts underlying this request are set forth in the attachment to the reference and need not be repeated in detail here. Suffice it to say that in the cases of the two staff agents in question there is a leave balance which in normal course would be forfeited at the start of the next leave year. According to the attachment to the reference, the two individuals involved are precluded from utilizing this accrued leave by reason of their cover assignments. Possible subterfuges to make this excess leave available are considered to be insecure.

2. As suggested by the attachment to the reference, the problem [REDACTED] indeed has broader implications than the two cases presented there-

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[REDACTED]

3. In view of the broader aspects of the problem we would prefer to comment upon this question in the general context, yet in such manner as to answer the specific inquiry raised in the reference.

4. The current maximum limitations upon leave accumulation are contained in Public Law 112 of the 83rd Congress, 67 Stat. 396, as amendments to the Annual and Sick Leave Act of 1951, 65 Stat. 679, 5 USC, 2061 et seq. These limitations are apparently unconditional in effect and have automatic application to any individual who is subject to the Act. This stringency of application is clearly intended to avoid the plethora of controversies that would arise if forfeiture of excess leave were predicated upon reasonable opportunity to the individual to utilize leave accumulated. Congress, therefore, must be presumed to have had clearly in mind the

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case of the individual who for reasons of administrative workload or temporary assignment away from usual post of duty is denied the chance to use an excess of leave. The Comptroller General has in the past with almost ruthless uniformity held that such an individual loses the leave he is thus precluded from taking. The question raised here necessitates a distinction of cases of this nature from those that are the subject of this memorandum. Such a distinction, we believe, can legally be made.

5. As stated above, the inflexibility of application of the forfeiture provisions in existing annual leave laws is designed to prevent incessant recurrence of contested cases based upon denial of reasonable opportunity to an individual to avail himself of accumulated leave. This rule may be considered to be reasonably grounded upon the premise that with some attention to administrative planning, leave schedules can be arranged during the course of a calendar twelve-month period to allow all employees a chance to utilize accumulated leave. The supervisor who neglects to give the matter of leave scheduling due attention runs a calculated risk in the form of employee opinion. Similarly, the individual who fails to request leave until the last moment runs a calculated risk that the necessity of his presence to handle an unanticipated rush of work may preclude his taking leave when he would most desire it. The law accordingly forces planned scheduling of leave by supervisor and employee alike. It cannot be said, however, to contemplate the situation where security and cover considerations compel an absolute prohibition upon the taking of leave in such amounts as will avoid a forfeiture. We do not believe that the Congress intended the forfeiture provisions to apply to such a situation. Accordingly, we are prepared to state that for so long as an individual remains under cover employment and by so doing is precluded from utilization of Federal leave in such amounts as to escape the forfeiture provision of existing law, such Federal leave as he may accrue may be held in a suspended account without regard to the forfeiture provisions of the law. A logical extension of this holding would permit a lump-sum leave payment upon termination of a staff agent under cover employment of the nature described to include the entire amount of any leave held in the individual's suspended account.

6. We would caution, however, that the inapplicability of the forfeiture provisions in the current leave law must be conditioned upon the existence of compelling cover and security requirements. Where such cannot be found to pertain, we believe that the forfeiture provisions continue to apply. Accordingly, all reasonable means to permit use of accrued leave, consistent with cover and security should be explored in a given situation before it may be said that the case falls outside the purview of the law. We would consider that in the cases raised for opinion in the reference, such means have been explored and we are satisfied that the law does not compel a forfeiture in these instances.

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7. This office would recommend that a procedure be determined by the Office of the Comptroller, in conjunction with the Personnel Office, to establish suspended leave accounts for those individuals who by reason of cover employment would forfeit annual leave at the start of any leave year. Such leave as would otherwise be forfeited would be held for the individual pending his return to a status in which he could properly utilize it. Upon such return, a determination might appropriately be made by the Personnel Office of the period of time during which the individual would be allowed to utilize his excess of leave. The Office of the Comptroller should, of course, be promptly advised of such determination.

8. We believe a procedure involving a form of suspense account is preferable to the alternative suggested in the reference of a lump-sum payment pursuant to paragraph 14.3a of the Confidential Funds Regulations. Any such payment creates a problem from the income tax standpoint since its true source may not be disclosed on the return. In any event, it is our opinion that a procedure of suspended accounts, in keeping with the considerations above set forth, works more to the mutual satisfaction of all concerned and is entirely proper under the law.

/s/
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Office of General Counsel

Attachment: Memo for ED/P-Admin to IG Division

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